and it is doubtful whether they ever expected compensation. The land held by the government was in substance a trust estate. Because the government was trustee, legislation instead of litigation was necessary to protect the trust estate. Hence the expenses of procuring it were appropriate and under the rule stated above should be charged on the fund.[18] The efficacy of this method of enforcing the plaintiff's claim is especially evident in this case. The power of one beneficiary to subject all who share in the benefit to a duty to share in the expenses, has been recognized as transferable to the attorney whom he employs.[19] In the principal case, since all parties are in court, as a practical matter, it is not unreasonable for the court to transfer the power to avoid circuity of action.

Recovery is allowed in *quantum meruit.* In so doing, the court says that it makes no difference whether the contracts were valid or not. This is, to say the least, a rather inaccurate statement. Valid contracts make a great difference under certain circumstances. If the court means only that recovery in *quantum meruit* is limited by the contract price, then it is correctly granting the same relief which would be allowed in *indebitatus assumpsit.*[20] However, the language conveys no such meaning. Assuming the contracts to be valid, let us examine the result in two different states of fact: (1) the contracting Indians under such a default as to amount to a repudiation of the contract; (2) the contracting Indians under no such default. In the first case, recovery against those Indians who contracted could logically be sustained on the theory of restitution. But it does not seem equitable that contribution for an amount greater than the contract price should be allowed, because the whole class would thus be penalized for the default of a few. In this event, since the sum which the beneficiaries could charge on the funds would not be identical with the sum for which they would be liable to the plaintiffs, the argument that recovery should be allowed to the plaintiffs to avoid circuity of action does not apply.[21] In the second case, the plaintiffs are waiving a valid express contract in an attempt to get more than they stipulated. Here, there is no ground for allowing recovery. But if we assume that the contracts were invalid, then recovery is correctly allowed in *quantum meruit,* and the only importance of the contracts, as the court said, was to show that the services were not rendered gratuitously.

In conclusion, the result reached in *Winton* v. *Amos* is extremely commendable provided that the recovery which is to be allowed is not in excess of the contract price. However, if the order of the court is to be interpreted so as to allow a greater recovery, the case cannot be justified. It can be accounted for, however, by the desire of the court to give effect to the jurisdictional acts which allowed the plaintiffs to sue.

RIGHTS OF INNOCENT PURCHASER OF ORDER CHECK ENDORSED BY PERSON BEARING SAME NAME AS PAYEE.—When an unendorsed check or draft payable to the order of an existing person comes into the possession of a third person bearing a name similar to or identical with that of the intended payee, and the third person endorses the check to an innocent purchaser for value, the question arises as to what rights he has upon the "instrument." This question was involved in the recent case of *Slattery & Company* v. *National City Bank* (Mun. Ct., City of N. Y. 1920) 186 N. Y. Supp. 679. The plaintiff stockbrokers had had business dealings

---

[18] *Supra,* footnote 7.

[19] *Central etc. Co. of Ga.* v. *Pettus* (1885) 113 U. S. 116, 5 Sup. Ct. 387; *cf. Schoenherr* v. *Van Meter* (1915) 215 N. Y. 548, 109 N. E. 625.

[20] *Supra,* footnote 10.

[21] The plaintiffs could of course recover more from those Indians with whom they contracted than the latter in turn could recover from the other Indians.

with two persons named Harold E. Richards, one of Texas, the other of Oklahoma. Their account with the Texas Richards had been closed and an expressedly final statement with a check for the balance due had been sent to him. Subsequently, the plaintiffs prepared a final statement of their account with the Oklahoma Richards which plainly showed the transaction out of which the balance due him arose, and enclosed it, together with a check for such balance, in an envelope erroneously addressed to the Texas Richards. Upon receipt of this letter and the check, the Texas Richards took the check to a local bank, endorsed it and received cash from this bank, who believed him to be the payee. The defendant, the correspondent of the Texas bank, collected the amount from the drawee and forwarded it to the Texas bank. Under these facts, the intended payee assigned all his rights to the drawer. In an action by the drawer against the defendant for conversion of the check and its proceeds, *held,* for the defendant. The decision was based upon the stated grounds that the endorsement of the "wrong" Richards was not a forgery as he was in fact the payee, that the drawer's original intent to make the check payable to Harold E. Richards of Oklahoma "was superseded and blotted out by the actual delivery of the check to Harold E. Richards of Texas," that the drawer was estopped by his negligence from asserting it was a forgery, and finally that as the plaintiff was first at fault, he should bear the loss.

Where the drawer of a check is dealing with an impostor, he has a double intent,—he intends to draw the check to X, whom Y has impersonated, and he also intends to draw it to the order of the person with whom he has been dealing. In this situation, the impostor has the power to create a claim in a holder in due course.[1] In explanation of this result, it is often contended that the drawer is bound because he has the "intent to deal with the person before him." As above stated, however, he actually has a double intent, either phase of which might equally be regarded as controlling. Is not the true basis of his liability then, the fact that, having had an opportunity to judge the advisability of trusting the impostor, he should not now set up his misjudgment to defeat an innocent purchaser for value?[2]

A holder in due course is also protected where an instrument, complete except for delivery, is stolen by the payee and negotiated by him.[3] Thus the potentiality of bills and notes as media of payment and exchange is increased. However, if an instrument not so completed is stolen, completed and endorsed, the innocent purchaser is not protected.[4] In further opposition to the general policy of making negotiable instruments as "negotiable as possible" is the rule that one cannot acquire the rights of a holder in due course if he claims through or under a forgery unless

---

[1] *Robertson* v. *Coleman* (1886) 141 Mass. 231, 4 N. E. 619; *First National Bk.* v. *American Exchange Bank* (1900) 49 App. Div. 349, 63 N. Y. Supp. 58; *Sherman* v. *Corn Exchange Bank* (1904) 91 App. Div. 84, 86 N. Y. Supp. 341; *Cureton* v. *Farmers' State Bank* (Ark. 1921) 227 S. W. 423. But see *Tolman* v. *American Nat. Bank* (1901) 22 R. I. 462, 48 Atl. 480.

[2] The drawer alone is at fault. He has had his chance to see and to inquire about the impostor, he has reached an erroneous conclusion as to his honesty, he has put the instrument into his hands expecting him to negotiate it, and consequently he should bear the loss.

[3] N. I. L. § 16, N. Y. Cons. Laws (1909) c. 38, § 35; *Schaeffer* v. *Marsh* (1915) 90 Misc. 307, 153 N. Y. Supp. 96.

[4] N. I. L. § 15, N. Y. Cons. Laws (1909) c. 38, § 34; *Linick* v. *Nutting & Co.* (1910) 140 App. Div. 265, 125 N. Y. Supp. 93.

[5] N. I. L. § 23, N. Y. Cons. Laws (1909) c. 38, § 42; *Anglo-South-American Bank* v. *National City Bank* (1914) 161 App. Div. 268, 146 N. Y. Supp. 457. By statute in England, if a bank in good faith pays a check drawn upon it, it is not liable even though the endorsement was forged. See Chalmers, *Bills of Exchange* (8th ed. 1919) § 60.

the drawer is estopped from asserting it,[5] because the endorsement of the genuine payee is required to pass title to an instrument payable to order.[6]

In the *Slattery* case, it is clear that the "wrong" Richards had no claim to the money nor privilege to possess the check as against the drawer. He was not the intended payee and the explanatory memorandum enclosed with the check gave him knowledge of that fact. In view of this knowledge on his part, his endorsement was a forgery. He must have signed his name under the pretence that his act was that of another person, i. e., that of the intended payee,—and that is clearly forgery.[7] But though no claim against the drawer could be created by force of the forgery alone,[8] yet the fact that there was a forgery is not conclusive as against third persons who are innocent purchasers for value. It may be that the drawer has so acted in thus carelessly sending the check directly to the "wrong" payee that he should be held responsible.

There is no basis in the instant case for a true estoppel, because the drawer has made no representation to the bank which purchased the check.[9] The affirmative and wrongful act of the Texas Richards in going to the bank was necessary before the purchaser ever saw the check. Hence, any "estoppel" must depend on whether the drawer has negligently violated some duty which he owed to the purchaser.[10] The "wrong" payee, by negotiating the check, has committed a breach of duty. But it is not reasonable to expect that crimes or wilful torts will intervene, and such acts are regarded as "breaking the chain of causation."[11] The act here clearly seems to be one which would have this effect, as the chance that a person to whom a check has been sent by mistake will forge or misuse it, cannot reasonably be anticipated.[12] Such a criminal or tortious act is not the proximate result of misdirecting the check. Hence, the drawer is not negligent with regard to persons who are the victims of the forgery or misuse,[13] and consequently not responsible to a purchaser.[14]

---

[6] *Miners & Merchants Nat. Bank* v. *St. Louis etc. Smelting Co.* (Mo. App. 1915) 178 S. W. 211; see *N. Y. Third Nat. Bank* v. *Merchants Nat. Bank* (1894) 76 Hun 475, 27 N. Y. Supp. 1070; *Thomas* v. *Bank of Gulfport* (1912) 101 Miss. 500, 58 So. 478. See also *supra*, footnote 5.

[7] Penal Law, N. Y. Cons. Laws (1909) c. 88, § 883. The question is: Whom did he intend to designate by his signature, himself or the payee? If he intended to designate himself, relying upon the identity of his name with that of the payee to create an appearance which would deceive the bank into a belief that he was the payee, his endorsement might not be a forgery. But nevertheless such an act is spurious, and inoperative to pass title. *Graves* v. *American Exchange Bank* (1858) 17 N. Y. 205.

[8] *Graves* v. *American Exchange Bank, supra,* footnote 7; *Beattie* v. *First Nat. Bank of Ill.* (1898) 174 Ill. 571, 51 N. E. 602.

[9] The facts as given in the *Slattery* case warrant the conclusion that the local Texas bank was not an agent for collection but had purchased the check from the "wrong" Richards.

[10] *Peoples Trust Co.* v. *Smith* (1915) 215 N. Y. 488, 491, 109 N. E. 561. "Actionable negligence involves first, the existence of a duty; second, the omission to exercise ordinary and reasonable care in connection therewith; and third, injury resulting in consequence thereof." Burr, J., in *Linick* v. *Nutting & Co., supra,* footnote 4, 267.

[11] *Mars* v. *D. & H. Co.* (1889) 54 Hun 625, 8 N. Y. Supp. 107; *Cole* v. *German Savings & Loan Co.* (C. C. A. 1903) 124 Fed. 113; *Peoples Trust Co.* v. *Smith, supra,* footnote 9.

[12] See *Société Générale* v. *Metropolitan Bank* (C. P. 1873) 27 L. T. R. N. S. 849, 858.

[13] *Gallo* v. *Brooklyn Savings Bank* (1910) 199 N. Y. 222, 92 N. E. 633, reversing 129 App. Div. 698, 114 N. Y. Supp. 78 which held the drawer liable for negligence in issuing a check to a person bearing a name similar to that of the payee, who forged the endorsement. *Cf. Peoples Trust Co.* v. *Smith, supra,* footnote 10, (forged assignment of bond and mortgage).

[14] If the Texas Richards had acted honestly, no injury would have resulted.

However, there might be a situation where the "wrong" person did not know that he was not the intended payee. The drawer, let us assume, has had previous business dealings with the "wrong" payee and may have made such a representation to him that he, as a reasonable man, would think that the check was intended for him. This case is analogous to the "impostor" cases. Hence, it would seem, the drawer would be responsible. The endorsement of this payee would not be a forgery and it would be only natural and reasonable to suppose that he would negotiate the check.[15]

There is some authority for holding the drawer responsible in the instant case.[16] Of course if it had not been for the drawer's carelessness, the wrong payee could not have negotiated the check. The "but for" rule, however, is not in favor today in determining legal cause.[17] Aside from this rule, however, the drawer, if held responsible, would be in no harder position than that of a drawer whose completed check has been stolen and endorsed and negotiated by the payee.[18] On the other hand, if he is not held responsible, the position of the bank is no worse than that of any purchaser from a forger. And since one can "forge his own name,"[19] too much weight should not be given to the fact that the name of the forger was the same as that of the intended payee.[20] By the great weight of authority which seems to be supported by analogy, the plaintiff in the instant case should have been allowed to recover.[21]

ELECTION UNDER A WILL.—What is the nature of an election under a will? What circumstances must be present to force a beneficiary of a will to an election? These questions are of importance in determining whether the recent case of *Brown et al.* v. *Gregson et al.*[1] was correctly decided.

An election has been defined as "the obligation imposed upon a party to

---

Should the drawer be held liable because he inadvertently put it within the power of someone else to commit a wrong?

[15] This would have been the approximate situation in the *Slattery* case if the statement "showing the transaction out of which the account arose" had not accompanied the check.

[16] *Weisberger Co.* v. *Barberton Savings Bank* (1911) 84 Ohio St. 21, 95 N. E. 379. This case has been the subject of subsequent criticism, seemingly deserved. See Brannan, *Negotiable Instruments Law* (3rd Ed. 1919) 86. The case cited no authorities and was a broad application of the "but for which" rule of legal cause.

[17] See (1911) 25 Harvard Law Rev. 109, and *supra,* footnotes 21 and 22.

[18] See *supra,* footnote 3.

[19] See *supra,* footnote 8. *Cf. People* v. *Peacock* (N. Y. 1826) 6 Cow. 72.

[20] See *Thomas* v. *Bank of Gulfport, supra,* footnote 6, 515.

[21] Further, there is some authority for holding that the delivery to the "wrong" Richards could be regarded by the intended payee as vesting title in him at his election. *Indiana Nat. Bank* v. *Holtsclaw* (1884) 98 Ind. 85; *cf. Thomas* v. *Bank of Gulfport, supra,* footnote 6. The plaintiff in the instant case, being his assignee, could enforce this title.

---

[1] [1920] A. C. 860. A testator left the residue of his property in trust to be divided among his several children, this provision to be accepted in lieu of their vested legal rights. He stipulated that if any child should repudiate the settlement and claim his legal rights he would forfeit all title to any part of his estate which the testator could dispose of by law. By a codicil the testator directed the trustees to hold for his daughter G. her share in life rent and after her death to divide it among her children. Part of the residuary estate consisted of land in Argentina by the law of which trusts in land were invalid. Thus the children succeeded automatically to the land in equal shares. G. claimed her legal rights and forfeited her interest under the will, but it was held in Scotland that her children could claim as independent legatees. The children of G. claimed that the children of the testator should surrender to the trusts of the will their shares of the land which passed to them under the law of Argentina, as a condition of taking their share of the residue in Scotland. *Held,* the children of the testator need not surrender their lands in Argentina.